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7 EDWARD THOMAS,  
8 Plaintiff,  
9 v.  
10 M. SEPULVEDA, et al.,  
11 Defendants.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case No. 14-cv-01157-CW  
ORDER GRANTING MOTION TO  
REVOKE IN FORMA PAUPERIS  
STATUS; GRANTING MOTION TO  
STRIKE SECONDARY REPLY; AND  
DISMISSING COMPLAINT

Re: Dkt. Nos. 17 and 27

12  
13 Plaintiff, a state prisoner incarcerated at Corcoran State  
14 Prison, has filed a pro se civil rights action pursuant to 42  
15 U.S.C. § 1983, alleging the violation of his constitutional  
16 rights by prison officials and medical staff at Salinas Valley  
17 State Prison (SVSP), where he was previously incarcerated. On  
18 June 12, 2014, the Court issued an order of service and granted  
19 Plaintiff's motion to proceed in forma pauperis (IFP). On August  
20 26, 2014, Defendants moved, under 28 U.S.C. § 1915(g), to revoke  
21 Plaintiff's IFP status. After the motion was fully briefed,  
22 Plaintiff filed a "secondary reply" to the summary judgment  
23 motion and, on October 15, 2014, Defendants filed a motion to  
24 strike the "secondary reply." Because Plaintiff did not seek  
25 approval from the Court to file a further pleading, see Civ. L.R.  
26 7-3(d) (after reply is filed, no additional documents may be  
27 filed without prior Court approval), and because Plaintiff merely  
28 repeats arguments from his opposition, Defendants' motion to  
strike the "secondary reply" is granted. For the reasons

1 discussed below, Defendants' motion to revoke Plaintiff's IFP  
2 status is granted.

3 DISCUSSION

4 I. Legal Standard

5 A prisoner may not bring a civil action IFP under 28 U.S.C.  
6 § 1915 "if the prisoner has, on 3 or more prior occasions, while  
7 incarcerated or detained in any facility, brought an action or  
8 appeal in a court of the United States that was dismissed on the  
9 grounds that it is frivolous, malicious, or fails to state a  
10 claim upon which relief may be granted, unless the prisoner is  
11 under imminent danger of serious physical injury." 28 U.S.C.  
12 § 1915(g).

13 For purposes of a dismissal that may count under § 1915(g),  
14 the phrase "fails to state a claim on which relief may be  
15 granted" parallels the language of Federal Rule of Civil  
16 Procedure 12(b) (6) and carries the same interpretation, the word  
17 "frivolous" refers to a case that is "'of little weight or  
18 importance: having no basis in law or fact,'" and the word  
19 "malicious" refers to a case "filed with the 'intention or desire  
20 to harm another.'" Andrews v. King, 398 F.3d 1113, 1121 (9th  
21 Cir. 2005) (citation omitted). Only cases within one of these  
22 three categories can be counted as strikes for § 1915(g)  
23 purposes, so the mere fact that a plaintiff has filed many cases  
24 does not alone warrant dismissal under § 1915(g). Id. Rather,  
25 dismissal of an action under § 1915(g) should only occur when,  
26 "after careful evaluation of the order dismissing an [earlier]  
27 action, and other relevant information, the district court  
28 determines that the action was dismissed because it was

1 frivolous, malicious or failed to state a claim." Id.

2 II. Plaintiff's Strikes

3 Defendants request that the Court take judicial notice,  
4 under Federal Rule of Evidence 201, of court records from two  
5 prior cases that Plaintiff brought in federal court: (1) Ex. A,  
6 Thomas v. Felker, 09-cv-2486-FEB-CKD-P (E.D. Cal.), (a) June 11,  
7 2012 findings and recommendation that IFP status be revoked;  
8 (b) July 19, 2012 order revoking IFP status; (c) October 12, 2012  
9 findings and recommendation to dismiss for failure to pay filing  
10 fee; and (d) November 8, 2012 order of dismissal and judgment;  
11 and (2) Ex. B, Thomas v. Beutler, 10-cv-1300-MCE-CKD (E.D. Cal.),  
12 (a) November 7, 2012 findings and recommendation that IFP status  
13 be revoked; (b) December 20, 2012 order revoking IFP status;  
14 (c) March 28, 2013 order of dismissal for failure to pay filing  
15 fee and judgment. Defendants also request that the Court take  
16 judicial notice of Ex. C, orders issued in the Ninth Circuit  
17 case, In re Edward Thomas, case no. 09-80085: (1) December 22,  
18 2009 order for Plaintiff to show cause why the court should not  
19 enter a pre-filing review order; (2) February 9, 2010 order  
20 directing clerk to enter pre-filing review order; (3) September  
21 6, 2012 order reviewing, under pre-filing order, appeal in Thomas  
22 v. Felker, case no. 09-2486-GEB-CKD, and finding it "so  
23 insubstantial" that it was not permitted to proceed; (4) December  
24 13, 2012 order reviewing, under pre-filing order, second appeal  
25 in Thomas v. Felker, case no. 09-2486-GEB-CKD, and finding it "so  
26 insubstantial" that it was not permitted to proceed; (5) March  
27 28, 2013 order reviewing, under pre-filing order, appeal in

1       Thomas v. Beutler, case no. 10-1300-MCE-CKD, and finding it "so  
2       insubstantial" that it was not permitted to proceed.

3              The request for judicial notice (RJN) of these court records  
4       is GRANTED. See Fed. R. Evid. 201(b) (2); United States v.  
5       Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (court may take judicial  
6       notice of public records, including its own records and records  
7       of other courts).

8              In Thomas v. Felker and Thomas v. Beutler, the district  
9       court in the Eastern District of California found that Plaintiff  
10      had filed three previous lawsuits that qualify as strikes under  
11      28 U.S.C. § 1915(g) and, therefore, denied his request to proceed  
12      IFP. See Defs' Request for Judicial Notice (RJN), Exs. A, B.  
13      The Court reviews the three cases that Felker and Beutler  
14      determined were strikes under § 1915(g) and also finds that they  
15      are strikes.

16              The first case the Eastern District court determined was a  
17      strike is Thomas v. Terhune, case number 03-cv-5467 (E.D. Cal.).  
18      The complaint in this case was dismissed on April 18, 2006  
19      because the allegations failed to state a claim on which relief  
20      may be granted. See doc. no. 24 at 7 (findings and  
21      recommendation to dismiss action) and doc. no. 26 (order adopting  
22      findings and recommendations, dismissing action, and directing  
23      entry of judgment for defendants). This qualifies as a strike.  
24      See Andrews, 398 F.3d at 1121 (dismissal for failure to state a  
25      claim counts as strike under § 1915(g)).

26              The second strike was the denial of Plaintiff's appeal of  
27      the court's dismissal and judgment in Thomas v. Terhune, case no.  
28      06-15901 (9th Cir. 2006). The district court had certified that

1 the appeal was not taken in good faith and revoked Plaintiff's  
2 IFP status. Id. at doc. no. 7. The Ninth Circuit reviewed the  
3 record, determined that Plaintiff was not entitled to IFP status  
4 on his appeal and ordered that he pay the filing fee within  
5 twenty-one days or the appeal would be dismissed for failure to  
6 prosecute. Id. Plaintiff did not pay the fee and, on September  
7 8, 2006, the Ninth Circuit dismissed the appeal for failure to  
8 prosecute. Id. at doc. no. 9. This qualifies as a strike. See  
9 O'Neal v. Price, 531 F.3d 1146, 1152 (9th Cir. 2008) (dismissal  
10 for failing to pay filing fee after court revokes IFP status  
11 counts as strike under § 1915(g)); see also Benyamini v. Mendoza,  
12 2012 WL 1378526, at \*2 (E.D. Cal.) ("dismissal of an appeal as  
13 frivolous after a district court dismissal on grounds that the  
14 action was frivolous counts as a strike").

15 The third strike was the denial of an appeal in Thomas v.  
16 Lamarque, case no. 07-16437 (9th Cir. 2007). This is an appeal  
17 of the district court's July 20, 2007 order in case number C 03-  
18 3873 VRW (PR) (N.D. Cal.), denying injunctive relief and denying  
19 without prejudice Plaintiff's various motions and requests  
20 challenging conditions of confinement. The district court  
21 indicated that the appeal was not taken in good faith. See case  
22 no. C 03-3873 VRW (PR), doc. no. 89. The Ninth Circuit issued an  
23 order indicating that it had reviewed the record, confirming that  
24 the appeal was not taken in good faith and revoking Plaintiff's  
25 IFP status. See case no. 07-16437, doc. no. 17. The Ninth  
26 Circuit notified Plaintiff that, if he did not pay the fee for  
27 the appeal, the appeal would automatically be dismissed for  
28 failure to prosecute. Id. Plaintiff did not pay the fee and, on

1 January 9, 2008, the Ninth Circuit dismissed the appeal for  
2 failure to prosecute. Id., doc. no. 20. Under O'Neal, 531 F.3d  
3 at 1152 and Benyamini, 2012 WL 1378526, at \*2, the dismissal of  
4 this appeal counts as a strike under § 1915(g).

5 III. Collateral Estoppel

6 Defendants also argue that, under the doctrine of collateral  
7 estoppel, the judgments in Thomas v. Felker and Thomas v. Beutler  
8 prevent Plaintiff from re-litigating whether he is a three-  
9 strikes litigant under § 1915(g). See Andrew v. Cervantes, 493  
10 F.3d 1047, 1057 n.11 (9th Cir. 2006) ("[N]ormal preclusion  
11 principles will prevent a prisoner from avoiding the three-strike  
12 rule based on allegations rejected in an earlier case.").

13 For collateral estoppel to bar relitigation of an issue, the  
14 following elements must be satisfied: (1) the issue at stake must  
15 be identical to the one alleged in the previous litigation;  
16 (2) the issue must have been actually litigated by the party  
17 against whom preclusion is asserted; and (3) the determination of  
18 the issue in the previous case must have been a critical and  
19 necessary part of the judgment. Trevino v. Gates, 99 F.3d 911,  
20 923 (9th Cir. 1996). Each of these elements is satisfied in  
21 Thomas v. Felker and Thomas v. Beutler.

22 First, the issue litigated in Felker and Beutler was  
23 identical to the one presented in this motion, that is, whether  
24 Plaintiff had accrued three strikes under § 1915(g). This  
25 satisfies the first requirement for collateral estoppel. Second,  
26 in both Felker and Beutler, the issue of whether Plaintiff had  
27 three strikes under § 1915(g) was the only issue litigated and  
thus it was "actually" litigated against Plaintiff, who is the

1 party against whom preclusion is asserted in this case. This  
2 satisfies the second requirement for collateral estoppel. Third,  
3 the § 1915(g) issue was a critical and necessary part of the  
4 judgments in both cases. This satisfies the third requirement  
5 for collateral estoppel. Also, the judgments in both cases are  
6 final. See Defs' RJD Exs. A and C (documenting Plaintiff's  
7 appeals in Felker and the Ninth Circuit's rejections of the  
8 appeals); Defs' RJD Exs. B and C (documenting Plaintiff's appeal  
9 in Beutler and the Ninth Circuit's rejection of it).

10 Because the requirements for collateral estoppel are  
11 satisfied, Plaintiff is collaterally estopped from litigating  
12 whether he has accrued three strikes under § 1915(g).

13 IV. Plaintiff's Arguments

14 Plaintiff offers several arguments that the cases determined  
15 to be strikes in Thomas v. Felker and Thomas v. Beutler are not  
16 strikes.

17 First, he contends that none of the "strikes" indicates it  
18 was dismissed because it was frivolous, malicious or failed to  
19 state a claim as required by § 1915(g). Plaintiff is incorrect  
20 that none of the strikes was dismissed on one of these grounds.  
21 As discussed above, Thomas v. Terhune was dismissed because  
22 Plaintiff's allegations failed to state a claim. See Terhune,  
23 no. 03-cv-5467 (E.D. Cal.) doc. no. 24 at 7 (findings and  
24 recommendation to dismiss action because allegations failed to  
25 state a claim for relief); doc. no. 26 (order adopting findings  
26 and recommendations, dismissing action, and directing entry of  
27 judgment for defendants). And, although the orders denying the  
28 appeals in Thomas v. Terhune and Thomas v. Lamarque did not

1 explicitly indicate the appeals were malicious, frivolous or  
2 failed to state a claim, this was implicit in the rulings. See  
3 Hooker v. American Airlines, 302 F.3d 1091, 1092 (9th Cir. 2002)  
4 (revocation of IFP status appropriate where court finds appeal is  
5 frivolous).

6 In Terhune, after the district court dismissed Plaintiff's  
7 complaint because the allegations failed to state a claim, it  
8 certified an appeal was not taken in good faith and revoked  
9 Plaintiff's IFP status. The Ninth Circuit independently reviewed  
10 the record, found that the appeal was not taken in good faith and  
11 revoked Plaintiff's IFP status on appeal. A finding that the  
12 appeal is not taken in good faith is the same as a finding that  
13 the appeal is frivolous. See Hooker, 302 F.3d at 1092. When  
14 Plaintiff did not submit the filing fee, the appeal was dismissed  
15 for failure to prosecute. Thus, the dismissals of the Terhune  
16 complaint and appeal were based primarily on the finding that  
17 they were frivolous; they were only secondarily dismissed because  
18 Plaintiff failed to pay the filing fee. Similarly, Plaintiff's  
19 appeal of the court's order in the Lamarque case was primarily  
20 based on the finding that the appeal was frivolous; it was only  
21 incidentally based on Plaintiff's failure to pay the filing fee.

22 Second, Plaintiff argues that his cases were dismissed for  
23 failure to pay the filing fee and, thus, should not count as  
24 strikes under 28 U.S.C. § 1915(b)(4), which provides that no  
25 "prisoner shall be prohibited from bringing a civil action or  
26 appealing a judgment for the reason that the prisoner has no  
27 assets and no means to pay the filing fee." Plaintiff  
28 mischaracterizes the courts' orders. As discussed above,

1 Plaintiff's case and appeals were not dismissed because he could  
2 not pay the filing fee. The grounds for dismissal were that his  
3 complaint failed to state a claim and his appeals were frivolous.  
4 As a result, Plaintiff's IFP status was revoked. That Plaintiff  
5 could not proceed without paying the filing fee does not change  
6 the fact that his IFP status was revoked on the grounds of  
7 frivolousness and failure to state a claim.

8 Third, Plaintiff argues that Felker and Buetler misapplied  
9 the holdings in O'Neal and Benyamini in ruling that the denials  
10 of his appeals were strikes. In O'Neal, the Ninth Circuit,  
11 interpreting federal IFP statutes, held that a court's dismissal  
12 of a case after it had denied the prisoner's IFP application  
13 because the complaint was frivolous, malicious or failed to state  
14 a claim counted as a strike under § 1915(g). O'Neal, 531 F.3d at  
15 1152. Felker and Buetler applied the O'Neal holding in  
16 determining that the appeal of Thomas v. Terhune, No. 06-15901  
17 was a strike. See Felker, C 09-2486, doc. no. 62 at 5; Buetler,  
18 C 10-1300, doc. no. 72 at 3-4. This was a proper application of  
19 O'Neal.

20 In Benyamini, the district court relied on Adepegba v.  
21 Hammans, 203 F.3d 383, 387-88 (5th Cir. 1996), to hold that  
22 dismissal of an appeal as frivolous after a district court  
23 dismissed the complaint on the ground that it was frivolous  
24 counts as a strike under § 1915(g). Benyamini, 2012 WL 1378526,  
25 \*2. Felker and Buetler applied the Benyamini holding to  
26 determine that Plaintiff's appeal of Thomas v. Terhune, No. 06-  
27 15901 was a strike. See Felker, C 09-2486, doc. no. 62 at 5;  
28 Buetler, C 10-1300, doc. no. 72 at 3-4. This was a proper

1 application of Benyaminini.

2 Fourth, Plaintiff argues that collateral estoppel does not  
3 apply because he has not previously litigated the issue of  
4 deliberate indifference to his serious medical needs by  
5 Defendants. Plaintiff misconstrues the doctrine of collateral  
6 estoppel. Collateral estoppel compares the issue presently being  
7 litigated with the issue that was previously litigated. In this  
8 motion, the issue being litigated is whether Plaintiff is a  
9 three-strikes litigant under § 1915(g). The merits of  
10 Plaintiff's complaint, that is, whether Defendants violated  
11 Plaintiff's constitutional rights, are not at issue here. This  
12 means that whether Plaintiff previously litigated his substantive  
13 claims against Defendants is not relevant to whether he is  
14 collaterally estopped from litigating the previous holdings that  
15 he is a three-strikes litigant.

16 Plaintiff also argues that the magistrate judge and district  
17 court judges presiding in Felker and Buetler were biased against  
18 him and that the pre-filing order issued by the Ninth Circuit  
19 Court of Appeals is unreasonable because it allows the rejection  
20 of his appeals without a determination if they are frivolous,  
21 malicious or fail to state a claim for which relief may be  
22 granted. These last two arguments are without merit.

23 Therefore, Plaintiff's arguments fail to show that the cases  
24 discussed above are not strikes.

25 V. Imminent Danger

26 The plain language of the imminent danger clause in  
27 § 1915(g) indicates that imminent danger of serious physical  
28 injury is to be assessed at the time of filing the complaint, not

1 at the time of the alleged constitutional violations. Andrews v.  
2 Cervantes, 493 F.3d 1047, 1055 (9th Cir. 2007); Abdul-Akbar v.  
3 McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) (en banc). The  
4 plaintiff must show a nexus between the imminent danger alleged  
5 in the complaint and the claims it asserts. Pettus v.  
6 Morgenthau, 554 F.3d 293, 299 (2nd Cir. 2009). This means that  
7 the plaintiff must show that (1) the imminent danger of serious  
8 physical injury is fairly traceable to the unlawful conduct  
9 asserted in the complaint and (2) a favorable judicial outcome  
10 would redress that injury. Id.

11 In 2014, when Plaintiff filed this complaint, he was  
12 incarcerated at Corcoran State Prison. Plaintiff's claim of  
13 deliberate indifference to his serious medical needs is based on  
14 the allegations that, in September and October 2010, when he was  
15 incarcerated at SVSP, Dr. Darren Bright canceled all of  
16 Plaintiff's medical mobility devices and J. Sepulveda denied  
17 Plaintiff's appeal of Dr. Bright's decision. Even liberally  
18 construed, Plaintiff's allegations do not show that, at the time  
19 he filed his complaint, he was in imminent danger of serious  
20 physical injury from Defendants' actions which occurred in 2010  
21 at a different prison.

22 Plaintiff argues that he is in imminent danger as a result  
23 of Defendants' actions because the medical staff at each  
24 institution to which Plaintiff has been transferred based their  
25 "continuation of denying and depriving Plaintiff's reinstatement  
26 of his orthopedic mobility assistive devices and apparatuses on  
27 Defendants Bright's and Sepulveda's opinionated medical  
28 determinations." Opp. at 26. However, imminent danger is

1 assessed from the complaint, not from Plaintiff's post-hoc  
2 arguments; the complaint contains no allegations that Plaintiff  
3 was in imminent danger as a result of Defendants' actions.  
4 Furthermore, as explained in the Court's denial of Plaintiff's  
5 motion for a preliminary injunction, the Court lacks jurisdiction  
6 over individuals at Plaintiff's present prison and, thus, a  
7 favorable judicial ruling on his claims would not redress his  
8 alleged present imminent danger. Therefore, the imminent danger  
9 exception under § 1915(g) does not apply.

10 Based on the foregoing, Defendants' motion to revoke  
11 Plaintiff's IFP status is granted. Plaintiff's IFP status is  
12 revoked and he is barred from proceeding IFP in this action.

13 When IFP status is revoked pursuant to § 1915(g), the  
14 district court may dismiss the action without prejudice to re-  
15 filing with payment of fees at the time the action is re-filed.  
16 See Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1998) (under  
17 § 1915(g), case was properly dismissed without prejudice to re-  
18 filing with payment of filing fees); O'Neal, 531 F.3d at 1152  
19 (when court denies application to proceed IFP on ground that  
20 complaint is frivolous, malicious or fails to state a claim, it  
21 may thereupon terminate the complaint).

22 CONCLUSION

23 Based on the foregoing, the Court orders as follows:

24 1. Defendants' motion for revocation of Plaintiff's IFP  
25 status is granted. Doc. No. 17. The Order entered on June 12,  
26 2014 (Doc. No. 6), granting Plaintiff leave to proceed IFP, is  
27 VACATED and Plaintiff's IFP status is REVOKED.

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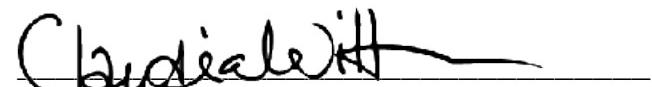
1           2. This case is dismissed without prejudice to Plaintiff's  
2 re-filing it with payment of the \$400 filing fee.

3           3. The Clerk of the Court shall terminate all motions, enter  
4 a separate judgment and close the file.

5           IT IS SO ORDERED.

6

7           Dated: October 23, 2014

8             
9           CLAUDIA WILKEN  
10           United States District Judge

11           United States District Court  
12           Northern District of California

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